

JIMMY L. BALDWIN

v.

TENNESSEE VALLEY AUTHORITY

Docket No.  
AT075209302

### OPINION AND ORDER

The appellant was removed from the position of electrician welder assignee for losing his welding certificate due to his poor welding performance. In his appeal to the Board's Atlanta Field Office, appellant contended that he was removed because of an argument with his foreman and general foreman.

The presiding official, in his initial decision, affirmed the agency action based on his review of the evidence of record. He also concluded that the evidence did not support appellant's allegation of personal animus.

In his petition for review appellant contends that the agency failed to provide certain witnesses for cross-examination at the hearing held before the presiding official and that the wrong standard of proof was applied. Further, he again asserts personal animus in that he believes his removal was the result of a scheme by his supervisors to revoke his welding credentials.

With regard to the allegation that appellant was a victim of a scheme, the presiding official noted that the welding inspectors who examined appellant's work on two occasions did not know at the time of the examination who had performed the work. It was determined only after the work was reported as deficient that appellant was responsible for it. For these reasons and because appellant's certification was removed by the welding engineering unit, whose members are not alleged participants in a scheme, the Board finds no error on the part of the presiding official in finding that the removal did not result from the personal animus of appellant's foreman and general foreman.

The appellant complains that his defense to the charges was prejudiced by the agency's failure to produce his foreman and general foreman as witnesses for cross-examination and by his inability to arrange for the appearance of a welding inspector who had since left the agency. The Board's regulations contain provisions for discovery and for the issuance of subpoenas for witnesses who are not Federal employees. 5 C.F.R. 1201.73 and 5 C.F.R. 1201.81. In addition, a presiding official can obtain the presence of a Federal employee to testify at a hearing on the request of a party. 5 C.F.R. 1201.33. Since the record does not reflect that the appellant availed himself of any of these methods for locating and obtaining the presence of a witness, he can not now be heard to complain that a witness was absent through the fault of another party.

Under the law and the Board's regulations, the degree of proof applicable to this case was a preponderance of the evidence, as the pre-

siding official correctly held. 5 U.S.C. 7701(c)(1)(B) and 5 C.F.R. 1201.56(a)(ii). The Board notes the appellant's argument that the agency should have been required to support its action by substantial evidence; however, since the Board has defined substantial evidence as a lesser degree of proof, a finding favorable to him on this allegation would not impose a greater burden on the agency or lead to the reversal of the action. See 5 C.F.R. 1201.56(c)(1) and (2).

After consideration of appellant's petition for review of the initial decision, the Board finds that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, and it is hereby DENIED.

This is the final decision of the Merit Systems Protection Board in this case. Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

WASHINGTON, D.C., *March 16, 1981*